95-1399

Supreme Court, U.S.
FILED
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CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARLYN EADES and JOAN EADES,

Petitioners,

v.

CLARK DISTRIBUTING COMPANY, INC.
and LESLIE DALE TROVILLION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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27pp

QUESTION PRESENTED

By creating and enforcing a duty to commence litigation without the issuance and service of a summons, have the 1993 Amendments to the Federal Rules of Civil Procedure brought Rule 4 into a direct conflict with Kentucky law, which requires the issuance of a summons to commence a civil action, such that the United States Court of Appeals for the Sixth Circuit erred in this case by relying on the holding of *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), instead of relying on the analysis of *Hanna v. Plumer*, 380 U.S. 460 (1956)?

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Petitioners Marlyn and Joan Eades respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on December 1, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, review of which is sought

by this petition, is reported as *Eades v. Clark Distributing Co.*, 70 F.3d 441 (1995). It is reprinted in the appendix of this petition at page A-1. The opinion of the United States District Court for the Western District of Kentucky is unpublished and is reprinted in the appendix at page A-6.

JURISDICTION

Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 1, 1995. This Court's jurisdiction to consider this petition from the final judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Kentucky Revised Statutes § 413.250:

> An action shall be deemed to commence on date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

RULES OF CIVIL PROCEDURE INVOLVED

Federal Rules of Civil Procedure, Rule 3:

> A civil action is commenced by filing a complaint with the court.

Federal Rules of Civil Procedure, Rule 4:

> The pertinent portions of Rule 4 are set out in the appendix at page A-8.

Kentucky Rules of Civil Procedure, Rule 3:

> A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.

Kentucky Rules of Civil Procedure, Rule 4.01:

> (1) Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons . . . .

STATEMENT OF THE CASE

On January 13, 1992, Petitioners Marlyn and Joan Eades were injured in an automobile accident when their car was struck by a truck driven for Respondent Clark Distributing Company by Respondent Leslie Dale Trovillion. 70 F.3d 441, 442; Record at 2.[1] On January 11, 1994, Petitioners, who are Ohio citizens, filed the complaint in this suit against the Respondents, over whom the state of Kentucky had personal jurisdiction, in the United States District Court for the Western District of Kentucky under the diversity jurisdiction provided for in 28 U.S.C. § 1332. 70 F.3d at 442; Record at 1-2.[2] Therefore, Petitioners' complaint was filed within the two-year commencement period required by the Kentucky statute of limitations. *See* Ky. Rev. Stat. 304.39-230(1).

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[1] All record references are to the "Copy of District Court Record," which was filed by Petitioners in the United States Court of Appeals for the Sixth Circuit and is referred to here as "Record at __."

[2] The complaint stated two causes of action: negligence and negligent infliction of emotional distress. Record at 2. However, because of the lower courts' decisions on the procedural matters discussed herein, there has been no development of the merits of this case.

Under the Federal Rules of Civil Procedure, the filing of the complaint would have successfully commenced the Petitioners' action within the two-year period. Fed. R. Civ. P., Rule 3. However, under Kentucky law, commencement of a civil action requires both the filing of the complaint *and* the issuance of a summons. Ky. R. Civ. P., Rule 3; Ky. Rev. Stat. 413.250. Because the Petitioners' summons was not issued until April 5, 1994, their action did not commence according to Kentucky law until almost three months after the statute of limitations period had run. 70 F.3d at 442. The Court of Appeals affirmed the District Court's decision to grant summary judgment in favor of the Respondents based on the conclusion that the Petitioners failed to timely commence their lawsuit under the Kentucky definition of commencement. *Id.*

REASONS FOR GRANTING THIS PETITION FOR CERTIORARI

The United States Court of Appeals for the Sixth Circuit erred in this case by relying upon this Court's decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). Although that decision appears to be controlling, the holding in *Walker* was based on this Court's conclusion that there was no conflict between the state and federal law. However, by creating and enforcing a duty to commence litigation without the issuance and service of a summons, the 1993 Amendments to the Federal Rules of Civil Procedure have brought Rule 4 into a direct conflict with Kentucky law, which requires the issuance of a summons to commence a civil action. Thus, the Sixth Circuit should have instead relied upon this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1956). Therefore, the Sixth Circuit has decided an important federal question in a way that conflicts with the relevant decisions of this Court. As a consequence,

Petitioners respectfully contend that this petition should be granted or, alternatively, that the decision below should be summarily reversed.

The facts in *Walker* are relatively simple and similar to the facts in this case. Oklahoma law defined "commenced" to require the filing of a complaint and the serving of summons on the defendant. *Walker*, 446 U.S. 740, 742-43. Although the plaintiff filed his complaint within the two-year statute of limitations, service of the summons was not completed on the defendant until after the two-year period (and a sixty-day state law tolling provision) had elapsed. *Id.* at 743. The plaintiff argued that *Hanna v. Plumer* required Federal Rule 3's definition of commencement, and not the state law definition, to be applied in that diversity case. *Id.*

In *Hanna*, this Court held that the Federal Rules, not the state law, control the manner of service of process in a diversity case. *Hanna*, 380 U.S. at 465. The Court stated that "in the absence of a conflicting state procedure, the Federal Rule would plainly control." *Id.* at 468. *Hanna* went on to state that *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), commanded the enforcement of state law only when the Federal Rule was not broad enough to cover the disputed point. *Id.* at 470.

However, the *Walker* Court was persuaded by *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). On facts identical to *Walker*, *Ragan* held that Federal Rule 3 did not control the manner of commencing suit for purposes of tolling the state statute of limitations. *Ragan*, 337 U.S at 533-34. Concluding that the case was "indistinguishable" from *Ragan*, the *Walker* Court considered the plaintiff's argument that the *Hanna* analysis should instead be applied:

> Application of the *Hanna* analysis is premised on a "direct collision" between the Federal Rule and the state law. In *Hanna* itself, the "clash" between Rule 4(d)(1) and the state in-hand service requirement was "unavoidable." The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered in the affirmative that the *Hanna* analysis applies.

Walker, 446 U.S. at 748-50. Indeed, *Hanna* distinguished *Ragan* as an example of a case where the state law was applied because the Federal Rule was not broad enough to cover the dispute. *Hanna*, 380 U.S. at 470.

Following *Ragan*, as distinguished by *Hanna*, *Walker* concluded that Federal Rule 3 merely governs the date from which various timing requirements of the Federal Rules begin to run. *Walker*, 446 U.S. at 750-51. *Walker* concluded that Rule 3 is not broad enough to affect state statutes of limitations because it was not intended to do so. *Id.* *Walker* held that the state law and Federal Rule 3 "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Id.* at 752. Based on these conclusions, *Walker* distinguished itself from *Hanna*:

> *Since there is no direct conflict between the Federal Rule and the state law, the Hanna analysis does not apply.* Instead, the policies behind *Erie* and *Ragan* control the issue . . . *in the absence of a federal rule directly on point* . . . .

Id. at 752-53 (emphasis added). Therefore, based on its conclusion that there was no direct collision between the state law and Federal Rule 3, *Walker* held that the state law definition of commencement controlled in a diversity action.

As stated above, the facts of this case are largely indistinguishable from the facts in *Walker*: the Petitioners filed their complaint, but did not have a summons issued, within the statute of limitations period. Thus, they satisfied the federal definition of commencement but not the definition stated in Kentucky law. Finding no reason to distinguish *Walker*, the Sixth Circuit concluded that *Walker* was "directly on point" and held that the Petitioners' claims were time-barred for failing to have a summons issued by the District Court within the statute of limitations period. 70 F.3d at 443.

However, the Sixth Circuit erred by deciding to apply the *Walker* analysis in this case. As discussed above, *Walker*'s holding is based upon its conclusion that Federal Rule 3 was not intended to toll statutes of limitations, and therefore is not broad enough to create a direct collision with state law definitions of commencement. *Walker*, 446 U.S. at 750-51. This conclusion is the analytical starting point of the *Walker* decision. In any case where the Federal Rules create a direct collision with the state law, *Walker* itself states that it is simply not applicable, and that the Federal Rule must be applied under *Hanna*. Despite their many factual similarities, there is one critical difference between the facts in this case and the facts in *Walker*: the 1993 Amendments to Rule 4 of the Federal Rules of Civil Procedure. By creating and enforcing a duty to commence litigation without the issuance and service of a summons, the amendments to Rule 4 have created a direct collision with state law definitions of commencement that require the issuance or service of a

summons. Therefore, while *Walker* may still stand for the application of state law where the Federal Rule is not broad enough to create a direct conflict, *Walker* can no longer be applied to the very facts upon which it was decided.

Although Rule 3 of the Kentucky Rules of Civil Procedure defines the commencement of a civil action as requiring both the filing of the complaint and the issuance of a summons, Rule 3 does not exist in a vacuum. It is closely connected to Kentucky Rule 4.01, which states that "[u]pon the filing of the complaint (or other initiating document) the clerk shall *forthwith* issue the required summons." Ky. R. Civ. P., Rule 4.01(1) (emphasis added). Therefore, while Kentucky Rule 3 states the filing of the complaint and the issuance of the summons as two separate requirements, Kentucky Rule 4.01 demonstrates that the filing of the complaint automatically mandates the court to issue a summons "forthwith."

Similarly, Federal Rule 3's definition of commencement--that a civil action is commenced with the filing of the complaint--is connected to Federal Rule 4. Before December 1, 1993, Federal Rule 4(a) was almost identical to the present Kentucky Rule 4.01: "Upon the filing of the complaint the clerk shall *forthwith* issue a summons." (emphasis added). Therefore, before December 1, 1993, there was no conflict between Federal Rule 4(a) and Kentucky Rule 4.01. This means that the *Walker* Court was not confronted with a set of facts where Federal Rule 4 was in direct conflict with the state law definition of commencement.

However, on December 1, 1993, a wholesale amendment of Federal Rule 4 went into effect, causing a fundamental change in the operation of the Federal Court system. Under the amended Federal Rules, and

unlike Kentucky's law, the issuance of a summons is no longer a mandatory part of the filing of every lawsuit: "*Upon or after filing the complaint*, the plaintiff *may* present a summons to the clerk for signature and seal." Fed. R. Civ. P., Rule 4(b) (emphasis added). The new, nonmandatory status of issuing a summons in federal court is part of the new federal waiver of service procedure.[3] As amended, Federal Rule 4 demands the avoidance of the cost of summons issuance and service altogether by stating that a defendant receiving notice of an action through a request for waiver of service of summons "has a *duty* to avoid unnecessary costs of serving the summons." Fed. R. Civ. P., Rule 4(d) (emphasis added). The new waiver procedure is enforced by providing that, when both parties are located in the United States, the court shall impose the costs of service on a defendant who refuses to waive issuance and service of a summons without good cause. *Id.* Also, while Federal Rule 12(a)(1) normally provides the defendant 20 days to answer the complaint after the service of summons, Federal Rules 12(a)(1)(B) and 4(d)(3) now provide that a defendant who waives service has 60 days after the date the waiver was sent to answer the complaint. Thus, through positive and negative reinforcement, the amended Federal Rule 4 requires the parties to save the cost of seeking the issuance and service of a summons.

The fact that Rule 4 no longer requires the issuance and service of a summons is the critical difference between the facts in this case and *Walker* upon which the Sixth Circuit should have distinguished

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[3] The fact that the removal of this "forthwith" issuance requirement has implications was foreseen by the drafters of the Federal Rules. The "forthwith" provision was written into Federal Rule 4 by the original drafters with the precise intent of preventing the question of whether the rule could be invoked to toll the state statute of limitations. Notes to Rules of Civil Procedure for the District Courts of the United States 3-4 (1938).

Walker and followed *Hanna*. As discussed above, the *Walker* Court stated that *Hanna* should be followed whenever the scope of the Federal Rule is sufficiently broad to control the issue before the court. *Walker*, 446 U.S. at 748-50. Further, *Walker* stated that:

> This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. *The Federal Rules should be given their plain meaning*. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.

Id. at 750 n.9 (emphasis added). Under the 1980 version of Federal Rule 4(a)--with the "forthwith" issuance of a summons--the *Walker* Court held that the Federal Rules were not broad enough to control the definition of commencement and reasoned that the state law definition and the Federal Rules could exist side by side "without conflict." *Id.* at 750-52. However, with the 1993 amendment to Federal Rule 4, *Walker*'s analysis is no longer applicable to this set of facts. In *Hanna*, this Court held that the Federal Rule directly conflicted with the state rule because the state required service by hand delivery while the federal rule allowed delivery by other means (even though personal service was also allowed). By so holding, the logical result of *Hanna* is that amended Federal Rule 4 conflicts with Kentucky law because the state requires issuance of a summons while the Federal Rule allows for a suit to be maintained without the issuance of a summons (even though issuance of a summons is permitted and sometimes required).

By making the issuance of a summons not mandatory, punishing defendants for failing to waive

service, giving defendants who waive service extra time to answer the complaint, and placing a duty on the parties to avoid the unnecessary costs of automatically issuing and serving summons, the amended Federal Rule 4 clearly and directly conflicts with Kentucky law's absolute requirement of issuing a summons to commence a civil action. Therefore, the *Hanna* analysis conclusively illustrates that there is a direct conflict in this case between the amended Federal Rule 4 waiver of summons provisions and the Kentucky law requiring the issuance of a summons for the commencement of a lawsuit. The *Walker* holding, which was expressly premised on the absence of a direct, controlling Federal Rule on point, cannot be applied to the facts of this case. Although the surface facts of the two cases appear to be the same, the intervening amendment to Federal Rule 4 wholly undermines any attempt to analyze this case under the *Walker* Court's analysis.

Further rationale for not using the *Walker* analysis here is that the facts of this case do not implicate the fears raised by this Court in *Ragan* and *Walker* about applying the Federal Rules in diversity cases. This is because the Petitioners would not be continuing a lawsuit in federal court that could not have continued in state court. In *Ragan*, "it was conceded that had the case been brought in Kansas state court it would have been barred" and the Court reasoned that they "cannot give [the cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action. We cannot do that consistently with *Erie R. Co v. Tompkins*." *Walker*, 446 U.S. at 746. Similarly, in *Walker*, the plaintiff conceded that "his case would be foreclosed in state court" and this Court relied on this fact in holding that:

> There is simply no reason why, *in the absence of a controlling federal rule*, an

> action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is a diversity of citizenship between the litigants.

Id. at 743, 753 (emphasis added). As discussed above, if the Petitioners had filed their complaint in Kentucky state court on January 11, 1994, that court would have automatically issued a summons "forthwith," and both parts of the state commencement definition would have been satisfied within the two year period. Ky. R. Civ. P., Rule 4.01. Further, not only did filing the Petitioner's lawsuit on January 11, 1994 satisfy the federal definition of commencement, 70 F.3d at 443, but if the Petitioners had filed the complaint on November 30, 1993 in federal court, a summons would have been issued "forthwith" under former Federal Rule 4(a) such that the state definition of commencement would have been satisfied. Therefore, it is clear that applying the Federal Rules in this case will not grant the Petitioners an opportunity that they could not have pursued in the state court, but instead will simply allow the Petitioners to have the same opportunity that they could have received had they originally filed their complaint in Kentucky state court. Thus, applying the Federal Rules in this case will not raise the fears expressed by this Court in *Ragan* and *Walker*.[4]

While the Sixth Circuit relied on *Walker* to decide this case, the above analysis demonstrates that *Walker* is actually inapplicable because it was based on a set of facts where there was no direct conflict

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[4] For the reasons just described, applying the Federal Rules in this case is also the only way to satisfy the twin aims of *Erie*: "discouragement of forum-shopping and the avoidance of in equitable administration of the laws." *Hanna*, 380 U.S. at 468.

between the Federal Rules and state law. By creating a system which seeks to avoid the issuance and service of summons, the 1993 Amendments to Rule 4 of the Federal Rules of Civil Procedure have created a direct conflict with the Kentucky law requiring the issuance of a summons to commence a civil action. Thus, it is now clear that the Sixth Circuit should have relied upon this Court's decision of *Hanna v. Plumer*.

In *Hanna*, this Court concluded that the *Erie* doctrine was not the appropriate test for the validity and applicability of a Federal Rule of Civil Procedure. *Hanna*, 380 U.S. at 470. *Hanna* explains that if the Federal Rule is clearly applicable, then the only remaining analysis is to confirm that the Rule is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and within a constitutional grant of power such as the Necessary and Proper Clause of Article I. *Id.* at 464. In *Hanna*, this Court held that former Federal Rule 4(d)(1) satisfied this test because "[p]rescribing the manner in which a defendant is to be notified that a suit has been instituted against him . . . relates to the 'practice and procedure of the district courts.'" *Id.* With no reason to conclude otherwise, this Court should hold that the 1993 Amendments to the Federal Rules are similarly within the scope of the Rules Enabling Act and a constitutional grant of power.

It is important for this Court to review the Sixth Circuit's opinion in this case in order to clarify the law. The Sixth Circuit recognized the power of the Petitioners' argument herein, but felt trapped by the *Walker* holding. The Sixth Circuit stated that "[w]ere *Hanna* the only Supreme Court opinion on point, and were we reasoning only from that opinion, Plaintiffs would have a strong argument." 70 F.3d at 443. Further, this confusion is bound to continue as more plaintiffs in diversity cases seek waiver of summons in states which define commencement of a civil action

with some reference to the issuance or service of a summons.

CONCLUSION

For all of the reasons stated herein, the Petitioners respectfully contend that the Sixth Circuit decision below has decided an important federal question in a way that conflicts with the relevant decisions of this Court. As a consequence, Petitioners respectfully contend that this petition should be granted or, alternatively, that the decision below should be summarily reversed.

Respectfully Submitted,

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APPENDIX

Marlyn Eades and Joan Eades,
Plaintiffs-Appellants,

v.

Clark Distributing Company, Inc.
and Leslie Dale Trovillion,
Defendants-Appellees.

No. 94-5982

United States Court of Appeals,
Sixth Circuit

Decided and Filed December 1, 1995

Before: MERRITT, Chief Judge; KENNEDY, Circuit Judge; JOINER, District Judge.*

MERRITT, Chief Judge. This case arises out of an automobile accident that occurred on January 13, 1992. Plaintiffs-Appellants, citizens of Ohio, sued Defendants-Appellees, a Kentucky company and its employee, in a diversity action in federal court in Kentucky. The complaint was filed on January 11, 1994, within the two-year period in which a motor vehicle injury action must be commenced under the Kentucky limitations statute. *See* Ky. Rev. Stat. Ann. § 304.39-230 (Baldwin 1987). Under Kentucky law, however, an action is deemed commenced not at the time a complaint is filed, but rather "on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action." Ky. Rev. Stat. Ann.

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* The Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by designation.

§ 413.250 (Baldwin 1991). This statutory directive is echoed in Rule 3 of the Kentucky Rules of Civil Procedure, which states that "[a] civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." Because a summons was not issued until April 5, 1994, the action did not "commence" for state law purposes until after the statute of limitations had run. The District Court held that the state definition of commencement, and not the one found in the Federal Rules, should apply in this diversity case, and it accordingly sustained defendants' motion for summary judgment.

The issue in this case is whether recent amendments to Rule 4 of the Federal Rules of Civil Procedure[1] have brought the Rules into direct conflict with Kentucky law governing the commencement of actions. Finding no conflict, we affirm the district court's holding that the state statute of limitation bars this litigation.

Plaintiffs argue that *Hanna v. Plumer*, 380 U.S. 460 (1965), requires a different result than that reached below. In *Hanna* the Supreme Court held that, where there is a "direct collision" between a Federal Rule of Civil Procedure and state law, the Federal Rule should apply if it is within the scope of the Rules Enabling Act and within the constitutional power of Congress. *Id.* at 464. Plaintiffs find a direct collision in that Kentucky

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[1] Rule 4 governs the form, issuance, and service of summons in federal civil actions. The Rule was extensively modified in 1983, and again in 1993. In their brief and at oral argument, Plaintiffs have focused the court on the new Rule 4(d), which allows a defendant, when notified by the plaintiff, to waive actual service of the summons and complaint. This practice of informal notice, first introduced as "service-by-mail" in the 1983 revisions to Rule 4 and then clarified in 1993, is intended to save costs. *See* Fed. R. Civ. P. 4 advisory committee notes, 1993 amendments.

law requires issuance of a summons to commence a case, whereas the Federal Rules deem a civil action commenced at the filing of the complaint. *See* Fed. R. Civ. P. 3. In addition, Plaintiffs note that the Federal Rules encourage waiver of service, *id.* at 4(d), and allow service of the summons at any time within 120 days from the filing of the complaint, *id.* at 4(m), and are thus fundamentally at odds with the Kentucky procedure. Indeed, it appears that this suit could continue if federal, rather than state, procedural rules were applied.

Were *Hanna* the only Supreme Court opinion on point, and were we reasoning only from that opinion, Plaintiffs would have a strong argument. But *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), is directly on point. There the Court, affirming *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), specifically held that "in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Walker*, 446 U.S. at 751. The Court went on to conclude that, "[s]ince there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752.

Plaintiffs argue that the 1993 amendments to Rule 4, which provide for waiver of service, were not considered by the Court in its *Walker* decision in 1980. They say that the new amendments bring the current version of the Federal Rules into direct conflict with state law. This contention is inconsistent with *Walker*. The Supreme Court's holding in *Walker* was based on a finding that Rule 3 was not intended to affect the tolling of state limitations statutes. The Court reached this conclusion in spite of the fact that Rule 3 specifically governs the date of commencement of federal actions. The new Rule 4 is a much poorer candidate than Rule 3 in the search for a direct conflict

with state limitations law. Nothing in the text of the rule relates in any way to the tolling of limitations statutes. Nor does it appear that the rule was intended by its drafters to change *Walker*. In fact, the Advisory Committee recognized that state law would be unaffected by the new amendments:

> Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. *Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by the filing of the action.* Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

Fed. R. Civ. P. 4 advisory committee notes, 1993 amendments (emphasis added).

Plaintiffs argue that by altering the definition of "direct collision," post-*Walker* cases suggest that state and federal tolling rules are in conflict and that the federal rule should thus apply. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 n.4 (1987) (noting that even though *Walker* required a "direct collision" before applying federal law, "this language is not meant to mandate that federal law and state law be perfectly co-extensive and equally applicable to the issue at hand; rather the 'direct collision' language . . . expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute"); *see also Burlington Northern R. Co. v. Woods*, 480 U.S. 2 (1987).

Neither *Stewart* nor *Burlington* compels the conclusion plaintiffs urge. Indeed, both cases cite

Walker with approval. *See Stewart*, 487 U.S. at 26, 31; *Burlington*, 480 U.S. at 5. More importantly, *Stewart* cites *Walker* as an example of federal and state rules existing side by side. *Stewart*, 487 U.S. at 31 ("This is thus not a case in which state and federal rules 'can exist side by side . . . each controlling its own intended sphere of coverage without conflict.'"), citing *Walker*, 446 U.S. at 752. Thus, neither *Stewart* nor *Burlington* undermine *Walker*'s holding that Rule 3 does not operate as a tolling statute on state law claims brought in diversity actions. *Wm. H. McGee & Co. v. Liebherr America, Inc.*, 789 F. Supp. 861, 866 (E.D. Ky 1992) (rejecting argument that *Burlington* and *Stewart* overruled *Walker*'s holding that federal courts must apply the substantive state tolling statutes in diversity actions).

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

ACTION C94-0005BG(H)

MARLYN EADES AND JOAN EADES

PLAINTIFFS

VS.

CLARK DISTRIBUTING CO., INC.
AND LESLIE DALE TROVILLION

DEFENDANTS

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT

This matter is before the court on motion for summary judgment filed on behalf of the plaintiffs. There is no dispute the accident occurred January 13, 1992; the complaint was filed January 11, 1994, and that summons was not issued until April 5, 1994.

Wm. H.. McGee & Co. v. Liebherr America, Inc., 789 F. Supp. 861 (E.D. Ky. 1992) concludes in a diversity case the state rule applies and requires both the filing of the complaint and the good faith issuance of summons within the limitation period. This is further the requirement of KRS 413.250 for the commencement of an action. This action was not commenced within two years as required by KRS 304.39-230(1) and (6), and is barred by limitations.

There is no genuine issue of material fact as to the dates, the defendants are entitled to judgment as a matter of law, and the court being sufficiently advised,

IT IS ORDERED that the motion of defendants for summary judgment is SUSTAINED, the complaint is

dismissed with prejudice, and the defendants shall recover their court costs. This constitutes a final and appealable judgment.

This 1st day of July, 1994.

RULES OF CIVIL PROCEDURE AT ISSUE

Federal Rules of Civil Procedure, Rule 4

(b) Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(d)(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. . . . If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure can be shown.

(d)(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2)

Supreme Court, U.S.
FILED
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No. 95-1399

In The

Supreme Court of the United States

October Term, 1995

MARLYN EADES and JOAN EADES,

Petitioners,

vs.

CLARK DISTRIBUTING COMPANY, INC. and LESLIE DALE TROVILLION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court properly apply the analysis set forth in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) in its dismissal of the plaintiff's claims on limitations for their failure to timely issue a summons as required by state law, the court finding no "direct conflict" between the 1993 amendments to the Rule No. 4 of the Federal Rules of Civil Procedure, as compared with Kentucky Revised Statute 413.250 and Rule 3 of the Kentucky Rules of Civil Procedure which require the issuance of a summons in order to commence a civil action?

PARTIES TO THE PROCEEDINGS

Petitioners, Marlyn Eades and Joan Eades, at all times relevant to these proceedings, are citizens and residents of the State of Ohio. The Petitioners were the plaintiffs in the trial court proceedings, and they were the appellants before the United States Court of Appeals for the Sixth Circuit.

Respondent, Clark Distributing Company, Inc., is a privately owned Kentucky corporation, and it has no parent or nonwholly owned subsidiary companies. Respondent, Leslie Dale Trovillion, was an employee driver of Clark Distributing Company, Inc. The Respondents were the defendants in the trial court proceedings and the appellees before the United States Court of Appeals for the Sixth Circuit.

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Appendix A — Order of the United States District Court, Western District of Kentucky at Bowling Green Dated August 18, 1994 ..... 1a

Appendix B — Relevant Rules of Civil Procedure at Issue 3a

Respondents, Clark Distributing Company, Inc. (hereinafter "Clark Distributing") and Leslie Dale Trovillion (hereinafter "Trovillion") respectfully submit that no Writ of Certiorari should issue in this case, as the United States Court of Appeals for the Sixth Circuit properly affirmed the judgment of the trial court in dismissing the plaintiffs' claims based upon limitations.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Eades v. Clark Distributing Co., Inc.*, 70 F.3d 441 (6th Cir. 1995). It is reprinted in full in the petitioners' appendix to their brief. The Opinion of the United States District Court for the Western District of Kentucky is unpublished, and it is reprinted in full in the petitioners' appendix to their brief. The Order of the United States District Court for the Western District of Kentucky overruling the plaintiffs' post-trial motions is unpublished, and it is reprinted in the appendix beginning at page 1a.

STATUTES AND RULES INVOLVED

Kentucky Revised Statutes 413.250

When action commences

> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of the action.

Federal Rules of Civil Procedure, Rule 3

> A civil action is commenced by filing a complaint with the court.

Federal Rules of Civil Procedure, Rule 4

> The provisions of Rule 4 are lengthy; to this extent, this rule is set forth in pertinent part in the appendix to this brief.

Kentucky Rules of Civil Procedure, Rule 3

> A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.

Kentucky Rules of Civil Procedure, Rule 4

> The provisions of Kentucky Rule 4 are lengthy; to this extent, this rule is set forth in pertinent part in the appendix to this brief.

STATEMENT OF THE CASE

On January 13, 1992, Marlyn and Joan Eades, the petitioners herein, were involved with respondent, Leslie Dale Trovillion in a motor vehicle accident occurring in Bibb County, Georgia. Trovillion was in the course and scope of his employment with respondent Clark Distributing. This motor vehicle accident served as the underlying basis for the petitioners' civil claims against the respondents herein. The petitioners filed a *pro se* complaint in the United States District Court for the Western District of Kentucky on January 11, 1994

based upon diversity jurisdiction. Marlyn and Joan Eades did not present a summons to the clerk for signature and seal with the filing of their complaint; therefore, no summons was issued to the plaintiff for service on the defendants at the time of the filing of the complaint. In fact, summons was not issued until April 5, 1994. Further, the petitioners did not otherwise notify the respondents of any commencement of any action, nor did the petitioners request that the respondents waive service of any summons.

Upon the issuance of summons on April 5, 1994, service was accomplished on Clark Distributing and Trovillion, and they both timely answered the plaintiffs' complaint, pleading limitations as an affirmative defense.

On June 6, 1994, Clark Distributing and Trovillion moved for summary judgment on the issue of limitations. Marlyn and Joan Eades filed no response. Summary judgment was granted by the trial court by its order dated July 1, 1994.

On July 20, 1994, Marlyn and Joan Eades filed a post-judgment motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The motion did not substantively address any of the grounds upon which the dismissal was previously granted; it simply argued that the matter was dismissed on "a technicality."[1] This post-judgment motion admittedly does not

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1. Marlyn and Joan Eades filed their post-judgment motion *pro se*; however, the contents of the motion indicate that the plaintiffs had counsel all along who did not enter an appearance of record in that they were not admitted to practice in Kentucky. Marlyn and Joan Eades acknowledged the receipt of the defendants' motion for summary judgment, but they asserted, because of their ignorance, they did not realize that a response was required. Clark Distributing and Trovillion were otherwise completely unaware of the identity of counsel for the Eades; accordingly, service of the motion for summary judgment was never made upon any attorney for the Eades.

raise any of the issues which the Eades presented to the United States Court of Appeals for the Sixth Circuit and also for which they now seek judicial review by this court.

The defendants at the trial level appropriately and timely responded to the plaintiffs' post-judgment motion. On August 18, 1994, the trial court overruled the Eades' post-judgment motion, noting that neither the law upon which the motion was based, nor the facts of the case, required a different result. The Eades appealed the decision of the trial court to the United States Court of Appeals, which affirmed the dismissal by a reported opinion styled *Eades v. Clark Distributing Co., Inc.*, 70 F.3d 441 (6th Cir. 1995).

SUMMARY OF ARGUMENT

The sole issue for which the petitioners seek review of this court was previously and properly decided in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). Therein, this Court held that there was no indication in the federal rules that the filing of an action, in and of itself, was sufficient to toll a state statute of limitations, much less that the federal rule would displace state tolling rules as they relate to limitations. Kentucky law requires that a summons be issued in order to commence an action and toll limitations; in the matter before the court, this was admittedly not accomplished by the petitioners. Therefore, the dismissal of this case was proper under the very clear language of *Walker*, *supra*.

REASONS FOR DENYING THE WRIT

Kentucky law requires that an action for personal injuries sustained in a motor vehicle accident is to be commenced not later than two years after the accident date, assuming that there are no payments of basic reparation benefits. Kentucky Revised

Statute 304.39-230(1). The petitioners concede a two year period of limitations applies to the instant action, and there has never been any factual dispute as to an occurrence date of January 13, 1992.

Further, Kentucky Revised Statute 413.250 expressly provides that "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of the action." Therefore, the petitioners herein filed their personal injury claim with the clerk of the United States District Court for the Western District of Kentucky within the limitations period following the accident in issue; however, summons was not issued until over three months later on April 5, 1994.

This case obviously invokes the principles which were first enunciated in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), which has come to be known as the "outcome test." In short, the Court in *Erie* determined that the outcome of litigation in federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in state court. *See Guaranty Trust Co. v. York,* 326 U.S. 99 (1945). In *Guaranty Trust,* the United States Supreme Court expressly held that statutes of limitation are substantive, as opposed to procedural, in nature.

The petitioners' reliance upon *Hanna v. Plumer,* 380 U.S. 460 (1965) is misplaced. *Hanna* simply stands for the proposition that if the terms of a federal rule plainly address the contested aspect of the litigation, then an analysis under the Rules Enabling Act and the Constitution is necessary. *Hanna v. Plumer,* 380 U.S. at 470-471. The test under the Rules Enabling Act examines whether the rule is truly procedural. The constitutional test is satisfied if the rule is within the ambit of a constitutional grant such as the Necessary and Proper Clause of

Article I. On the other hand, if the plain meaning of the federal rule does not cover the point in dispute, then the principles drawn from *Erie* serve as a bar against encouraging forum shopping or inequitable administration of the law. Under an *Erie* analysis, when the state's rule on tolling is an integral part of the state's substantive policies, it will apply over practice under the federal rule.

The Court, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), examined Fed. R. Civ. P. 3, which simply states that "[a] civil action is commenced by filing a complaint with the court." The *Walker* Court held that Rule 3 did not indicate that it tolled a state statute of limitations; therefore, an *Erie* analysis was required. The state rule, which did explicitly deal with tolling upon filing, was an integral part of the state's substantive statute of limitations giving the state rule, and not federal practice, control on the tolling issue. *Walker* at 746-47.

Kentucky Revised Statute 413.250 expressly states that an action commences with the issuance of summons. This is echoed in Rule 3 of the Kentucky Rules of Civil Procedure. Moreover, Kentucky courts have consistently held that a summons is necessary in order to toll the statute of limitations. *Whittinghill v. Smith*, 562 S.W. 2d 649 (Ky. App. 1977); *Brock v. Turner Fuel Co.*, 296 Ky. 729, 178 S.W. 2d 427 (1944).

Therefore, applying the *Erie* outcome test to the matter now pending, it is clear that the dismissal of the complaint was entirely proper. Throughout these proceedings, the Eades have completely ignored the holding of *Ragan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 (1949), wherein this Court held that a federal court in a diversity case *must* follow the state rule with regard to the commencement of an action for limitations purposes. *Hanna*, upon which the petitioners rely, certainly did not overrule *Ragan*, and this Court expressly noted this in *Walker*

v. Armco Steel Corp., supra. In fact, *Ragan* expressly holds that a state statute that does not deem an action to be commenced until service of process on the defendant is accomplished must be applied by a federal court in diversity litigation. The Eades, in their arguments now before this Court, are making the very same arguments which were previously presented in *Ragan* and *Walker,* and this Court has expressly held:

> This Court in *Hanna* distinguished *Ragan* rather than overruled it, and for good reason. Application of the *Hanna* analysis is premised on a "direct collision" between the Federal Rule and the state law. 380 U.S., at 472 [85 S. Ct. at 1144]. Rule 3 simply states that a civil action is commenced by filing a complaint with the court. There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations. . . .
>
> Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply. Instead, the policies behind *Erie* and *Ragan* control the issue whether, in the absence of a Federal Rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in Federal

> Court under diversity jurisdiction. . . .There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in Federal Court solely because of the fortuity that there is diversity of citizenship between the litigants.

Walker, 446 U.S. at 749-753 (footnotes omitted).

Moreover, the petitioners have argued throughout these proceedings that *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) and *Burlington N.R.R. Co. v. Woods*, 480 U.S. 1 (1987) support their position. It must be remembered, however, that *Walker* was cited with approval in both *Stewart Org., supra,* and *Burlington, supra.* Importantly, *Stewart* cites *Walker* as an example of federal and state rules existing side by side. *Stewart,* 487 U.S. at 31. This Court has consistently regarded state statutes of limitation as being unique and having consistently ruled in keeping with *Erie* since that holding was delivered in 1938. The various Circuit Courts, when presented with this same issue, have uniformly followed the rule of *Walker* and held that state law determines when limitations are tolled. *Walker v. Thielen Motors, Inc.*, 916 F.2d 450, 451 (8th Cir. 1990); *Patterson v. American Bosch Corp.*, 914 F.2d 384, 387 (3d Cir. 1990); *Converse v. General Motors Corp.*, 893 F.2d 513, 516 (2d Cir. 1990); *Mullen v. Sears, Roebuck & Co.*, 887 F.2d 615, 616-18 (5th Cir. 1989); *Rowland v. Patterson,* 852 F.2d 108, 110 (4th Cir. 1988), *on reh'g,* 882 F.2d 97 (4th Cir. 1989); *State of Wis. Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569, 1573 (S.D. Fla. 1991).

Given the Supreme Court's holding in *Walker* that Rule 3

was not intended to affect the tolling of limitations, it is most obvious that the revised Rule 4 is an even less likely candidate in the search for a "direct collision" between the state and federal rules. Absolutely nothing in the text of the new Rule 4 relates in any way to tolling limitations. Additionally, the Advisory Committee also explicitly recognized that state laws would be unaffected by the new amendments, noting:

> Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. *Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by the filing of the action.* Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

Fed. R. Civ. P. 4 advisory committee notes, 1993 amendments (emphasis added).

Finally, this Court should again be advised that Clark Distributing and Trovillion never received any notice whatsoever from the Eades regarding the filing of the complaint. The Eades never requested that Clark Distributing or Trovillion waive service of a summons in accordance with Rule 4(d)(2), and the trial court certainly never imposed any costs in effecting service upon Clark Distributing or Trovillion for their failure to waive service, as a waiver was never requested. Therefore, it is respectfully submitted that the Eades cannot now rely upon a rule that they did not even attempt to invoke at the trial level and upon which they never presented the trial court an opportunity to rule.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari in the instant action should be denied. The United States Court of Appeals for the Sixth Circuit correctly affirmed the decision of the trial court in its dismissal of all claims for the petitioners' failure to commence their action in accordance with the applicable substantive law of Kentucky. The issue presented within the petition has been consistently resolved by this Court in a manner which dictates a dismissal.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN DATED AUGUST 18, 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

ACTION C94-0005BG(H)

MARLYN EADES AND JOAN EADES

PLAINTIFFS

VS.

CLARK DISTRIBUTING CO., INC. AND LESLIE DALE TROVILLION

DEFENDANTS

ORDER DENYING MOTION ON BEHALF OF PLAINTIFFS FOR FRCP 60(B) RELIEF FROM JUDGMENT

This matter is before the court on motion of plaintiffs for relief from the judgment entered July 7, 1994. The individual plaintiffs argue that because of their own lack of knowledge, they were not aware of their obligation to respond to the motion for summary judgment on behalf of defendants. The plaintiffs further argue that their attorneys are not licensed to practice law in the Commonwealth of Kentucky.

The facts remain the same, and the motion cites no authority requiring a different result. This court concludes the motion fails

to state grounds for relief in accordance with FRCP 60(b) and the court being sufficiently advised,

IT IS ORDERED that the motion of the two plaintiffs for relief from the July 7, 1994, judgment, based upon FRCP 60(b) is **DENIED**.

This 18th day of August, 1994.

APPENDIX B — RELEVANT RULES OF CIVIL PROCEDURE AT ISSUE

FEDERAL RULES OF CIVIL PROCEDURE, RULE 4

RULE 4. SUMMONS

(b) **Issuance.** Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(c) **Service With Complaint; by Whom Made.**

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint . . .

(d) **Waiver of Service; Duty to Save Costs of Service; Request to Waive.**

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice

of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a

reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown. . . .

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

KENTUCKY RULES OF CIVIL PROCEDURE, CR 4. PROCESS

CR 4.01 Summons; Issuance; By Whom Served

(1) Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons and, at the direction of the initiating party, either:

Appendix B

(a) Place a copy of the summons and complaint (or other initiating document) to be served in an envelope, address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished by the initiating party, affix adequate postage, and place the sealed envelope in the United States mail as registered mail or certified mail return receipt requested with instructions to the delivering postal employee to deliver to the addressee only and show the address where delivered and the date of delivery. . . .

(b) Cause the summons and complaint (or other initiating document), with necessary copies, to be transferred for service to any person authorized, other than by paragraph (1) of this Rule, to deliver them, who shall serve the summons and accompanying documents, and his return endorsed thereon shall be proof of the time and manner of service.

CR 4.04 Personal Service; Summons and Initiating Document

(1) . . . The initiating party shall furnish the person making service with such copies as may be necessary.

(3)

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PETITIONERS' REPLY BRIEF

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY BRIEF

Petitioners Marlyn and Joan Eades respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on December 1, 1995. Respondents' arguments (and lack of arguments) highlight why this Court should issue a writ of certiorari on the question presented in this case.

I. This Court Should Grant the Petition for Certiorari in Light of the Fact that the Sixth Circuit has Decided this Important Question in a Way that Conflicts with the Relevant Decisions of this Court

The Respondents contend that the "sole issue" raised by the Petitioners to this Court was "previously and properly decided in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)." Respondents' Brief in Opposition at 4. As a result, the Respondents' arguments consist of little more than lengthy quotations from the *Walker* opinion, an assertion that the Petitioners' reliance upon *Hanna v. Plumer*, 380 U.S. 460 (1965) is "misplaced," and an accusation that the Petitioners have "completely ignored the holding of *Ragan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 (1949)." *Id.* at 4-8.

In fact, the Respondents have asked this Court to repeat the very error which was made below by the United States Court of Appeals for the Sixth Circuit: to reject the Petitioners' argument, and deny this petition, based simply upon the *Walker* holding. However, this Court should not rely upon the *Walker* decision because intervening changes to the Federal Rules of Civil Procedure have negated *Walker*'s applicability to the facts in this case. Under the 1980 version of Federal Rule 4(a)--with the "forthwith" issuance of a summons--the *Walker* Court held that the Federal Rules were not broad enough to control the definition of commencement and reasoned that the state law definition and the Federal Rules could exist side by side "without conflict." *Walker*, 446 U.S. at 750-52.[1] This

[1] In reaching this conclusion, the *Walker* Court stated:

conclusion is the analytical starting point of the *Walker* decision; in any case where the Federal Rules create a direct collision with the state law, *Walker* itself states that it is simply not applicable, and that the Federal Rule must be applied under *Hanna*.[2]

Despite their many factual similarities, there is one critical difference between the facts in this case and the facts in *Walker*: the 1993 Amendments to Rule 4 of the Federal Rules of Civil Procedure. By creating and enforcing a duty to commence litigation without the issuance and service of a summons,[3] the amendments to Rule 4 have created a direct collision with Kentucky law's absolute requirement of issuing a summons to commence a civil action.[4] Ky. R. Civ. P., Rule 3; Ky.

> This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. *The Federal Rules should be given their plain meaning.* If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.

Walker, 446 U.S. at 750 n.9 (emphasis added).

[2] In *Hanna*, this Court held that the Federal Rules, not the state law, control the manner of service of process in a diversity case. *Hanna*, 380 U.S. at 465. The Court stated that "in the absence of a conflicting state procedure, the Federal Rule would plainly control." *Id.* at 468. *Hanna* went on to state that *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), commanded the enforcement of state law only when the Federal Rule was not broad enough to cover the disputed point. *Id.* at 470.

[3] Amended Federal Rule 4 achieves this result by making the issuance of a summons not mandatory, punishing defendants for failing to waive service, giving defendants who waive service extra time to answer the complaint, and placing a duty on the parties to avoid the unnecessary costs of automatically issuing and serving summons. Fed. R. Civ. P., Rule 4(b), (d)(2), (d)(3).

[4] In *Hanna*, this Court held that the Federal Rule directly conflicted with the state rule because the state required service by hand delivery while the federal rule allowed delivery by other means (even though personal service was also allowed). In this case, the logical result of *Hanna* is that amended Federal Rule 4 conflicts with Kentucky law because the state requires issuance of a summons while the Federal Rule allows for a suit

Rev. Stat. § 413.250. While *Walker* may still stand for the application of state law where the Federal Rule is not broad enough to create a direct conflict, the intervening amendment to Federal Rule 4 wholly undermines any attempt to analyze this case under the *Walker* Court's analysis.[5]

The Respondents' contention that *Walker* resolves the question presented by the Petitioners demonstrates that the Respondents simply fail to appreciate the above argument. Nowhere is the Respondents' failure clearer than where they state that "[t]he various Circuit Courts, *when presented with this same issue*, have uniformly followed the rule of *Walker* and held that state law determines when limitations are tolled." Respondents' Brief in Opposition at 8 (emphasis added). In support of this assertion, the Respondents cite six cases, all of which were decided between 1988 and 1991. *Id.* Obviously, none of these pre-1993 cases could have discussed the 1993 Amendments to Rule 4, and thus could not have discussed whether those changes required a reconsideration of reliance on *Walker* on these facts. By arguing that these pre-1993 cases presented the "same issue" as is presented in this case, the Respondents demonstrate that they fail to understand the Petitioners' argument.

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to be maintained without the issuance of a summons (even though issuance of a summons is permitted and sometimes required).

[5] This analysis demonstrates that the Sixth Circuit should have relied upon this Court's decision of *Hanna v. Plumer* in this case. *Hanna* explains that if the Federal Rule is clearly applicable, then the only remaining analysis is to confirm that the Rule is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and within a constitutional grant of power such as the Necessary and Proper Clause of Article I. *Hanna*, 380 U.S. at 464. The Respondents do not dispute that the 1993 Amendments to the Federal Rules are within the scope of the Rules Enabling Act and a constitutional grant of power.

Finally, the Respondents make two other arguments that deserve brief mention. First, by taking a quotation out of context from the Rule 4 Advisory Committee Notes, the Respondents attempt to argue that the amended Rule 4 was not intended to change the result in *Walker*. Respondents' Brief in Opposition at 9. However, the Respondents fail to acknowledge that the quotation appears almost immediately after the Notes reference the *Walker* case. Advisory Committee Notes, Fed. R. Civ. P., Rule 4. Therefore, placed in its proper context, the quotation relied upon by the Respondents is not a statement of intent but instead nothing more than a simple recitation of the *Walker* holding.

Also, the Respondents assert that they were never asked to waive service of summons by the Petitioners in accordance with amended Rule 4. Respondents' Brief in Opposition at 3, 9. However, the Respondents do not support their statement as they fail to cite to the record in this case. Indeed, under amended Rule 4, the waiver is only filed with the court if the defendant agrees to waive service of summons. Fed. R. Civ. P., Rule 4(d)(4). Accordingly, the only point on which the record in this case is not silent is the fact that the Respondents did not waive service of summons. Because the record is silent about whether the Petitioners sought a waiver of service in this case, the Respondents' argument on this point must fail.[6]

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[6] The Respondents appear to raise this issue as one of fairness. While that argument fails for the reasons just detailed, this Court should note that the Petitioners' fairness argument has gone unchallenged by the Respondents. As a matter of fairness, the Federal Rules should be applied in this case to allow the Petitioners to have the same opportunity that they could have received had they originally filed their complaint in Kentucky state court. For a more detailed explanation of this argument, please see Petition at 11-12.

II. This Court Should Grant the Petition for Certiorari in Light of the Fact that the Respondents do not Dispute the Importance of the Question Presented

By failing to dispute the final paragraph of the petition, the Respondents concede the importance of the question presented by the Petitioners in this matter. Specifically, the Respondents do not dispute the Petitioners' assertion that the Sixth Circuit recognized the power of the Petitioners' argument herein, but felt trapped by the *Walker* holding. Petition at 13. Further, the Respondents concede that, unless this Court resolves the question presented by this petition, similar confusion will continue as other plaintiffs in diversity cases seek waiver of summons in the twelve (12) states--including New York--which define commencement of a civil action with some reference to the issuance, filing, or service of a summons. Petition at 13-14.[7]

In 1949, this Court decided the *Ragan* case, stating that certiorari was granted "because of the importance of the issue presented." *Ragan*, 337 U.S. at 532. Sixteen years later, in 1965, this Court heard the *Hanna* case because of the "threat to the goal of uniformity of federal procedure posed by the decision

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[7] The twelve states requiring the issuance, filing, or service of a summons for commencement are: Connecticut, Delaware, Kentucky, Minnesota, New Hampshire, New York, North Dakota, South Carolina, South Dakota, Tennessee, Washington, and Wisconsin. Conn. Gen. Stat. Ann. § 52-45a (filing of a writ of summons); Del. Ct. C.P. Civ. R., Rule 3 (filing of a praecipe directing the Clerk to issue a writ); Ky. R. Civ. P., Rule 3 (issuance of a summons); Minn. R. Civ. P., Rule 3.01 (service of a summons); N.H. Sup. Ct. R., Rule 3 (filing of a writ), and N.H. Dist. Ct. R., Rule 3.2 (same); N.Y. C.P.L.R. § 304 (filing of a summons); N.D. R. Civ. P., Rule 3 (service of a summons); S.C. R. Civ. P., Rule 3 (filing and service of a summons); S.D. Cod. L. § 15-2-30 (service of a summons); Tenn. R. Civ. P., Rule 3 (filing of a summons); Wash. Civ. R., Rule 3 (service of a summons); Wisc. Stat. Ann. § 801.02 (filing of a summons).

below." *Hanna*, 380 U.S. at 463. In 1980, fifteen years after *Hanna*, this Court decided the *Walker* case and an issue which "has troubled this Court for many years." *Walker*, 446 U.S. at 744. It is now sixteen years since the *Walker* decision and, like clockwork, an issue which was once thought decided has risen again due to an intervening amendment to the Federal Rules of Civil Procedure. The question presented in this petition is as important today as when this Court agreed to decide the *Ragan*, *Hanna*, and *Walker* cases. Therefore, this Court should grant certiorari, and review the Sixth Circuit's opinion in this case, so that this Court may again clarify the law on this important question.

CONCLUSION

For all of the reasons stated herein and in the Petition, the Petitioners respectfully contend that the Sixth Circuit decision below has decided an important federal question in a way that conflicts with the relevant decisions of this Court. As a consequence, Petitioners respectfully contend that this petition should be granted or, alternatively, that the decision below should be summarily reversed.

Respectfully Submitted,

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